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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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Arizona Corporation Commission

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MAY 14 2010

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SWING FIRST GOLF, LLC,
Complainant,

DOCKET NO. WS-02987A-08-0049

vs.

JOHNSON UTILITIES, LLC,
Respondent.

**STAFF'S RESPONSE TO MOTION
FOR SUMMARY JUDGMENT**

Pursuant to the procedural order dated March 29, 2010, the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission"), files its response to the Motion for Summary Judgment filed by Johnson Utilities LLC ("Johnson" or "JUC") and the Response to the Motion for Summary Judgment ("MSJ") filed by Swing First Golf, LLC ("SFG" or "Swing First") and Johnson's response to SFG response.

I. BACKGROUND.

SFG filed a formal complaint against Johnson in January, 2008.¹ SFG subsequently amended its complaint in February 2008. In its amended complaint, SFG raised the following complaints and made the following allegations:

- JUC overcharged it for water deliveries and minimum bills
- JUC owed a billing credit related to a service arrangement
- JUC was charging a superfund tax in violation of its tariff
- JUC was overcharging transaction and privilege tax
- JUC had failed to properly read SFG meters
- SFG has suffered numerous service interruptions

SFG then requested the following relief:

- The Commission to order Utility to continue providing service during the pendency of this matter;

¹ Docket No. WS-02987A-08-0049.

- The Commission to hold a hearing to determine the actual amount that Utility should have charged Swing First over the period of November 2004 to the present, compare this to amount Swing First has provided Utility during this period, and order Utility to provide a refund to Swing First, together with appropriate interest;
- The Commission to order Utility to stop charging Swing First for the Superfund Tax;
- The Commission to order Utility to render proper bills to Swing First each month, based on actual meter reads, one 3-inch meter, the effluent rate of \$0.62 per thousand gallons, and the Transaction Privilege tax of \$0.067 per thousand gallons;
- The Commission to order Mr. George Johnson to personally apologize to Swing First and its members for its abysmal customer service and for Mr. Johnson's abusive and obscene language; and
- For such further relief as the Commission deems appropriate.

Johnson filed a rate application in March 2008. The evidentiary hearing on the rate application was held over eleven days in April and September 2009. The Recommended Opinion and Order² was issued on May 7, 2010 and is scheduled to be heard at Open Meeting on May 26 and 27, 2010.

Johnson filed a motion for summary judgment in December 2008. Since the filing of the motion for summary judgment in December 2008, there has been extensive discovery between JUC, SFG and Staff, as well as an evidentiary hearing on the rate application. SFG was an intervenor and fully participated in the rate proceeding. In December 2009, SFG filed the Direct Testimony of David Ashton. In his testimony, Mr. Ashton requested additional relief and requested that attorney's fees be granted in this matter for the proceeding.

For the reasons set forth below, Staff recommends denial of JUC's MSJ. Staff also recommends that the complaint proceeding be stayed pending the final order of the Commission in the rate proceeding.³

II. STANDARDS FOR SUMMARY JUDGMENT.

The essence of the summary judgment rule is as follows:

The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

² Docket No. WS-02987A-08-0180.

³ *Id.*

1 there is no genuine issue as to any material fact and that the moving party is entitled to a
2 judgment as a matter of law. 16A.R.S. Ariz.R.Civ.P.Rule56(c).⁴

3 The court in *Orme* went on to hold:

4 We hold, therefore, that although the trial judge must evaluate the evidence to some
5 extent in ruling on a motion for summary judgment, the trial judge is to apply the same
6 standards as used for a directed verdict. Either motion should be granted *if the facts*
7 *produced in support of the claim or defense have so little probative value, given the*
8 *quantum of evidence required, that reasonable people could not agree with the*
9 *conclusion advanced by the proponent of the claim or defense. Thus, assuming*
10 *discovery is complete, the judge should grant summary judgment if, on the state of the*
11 *record, he would have to grant a motion for directed verdict at the trial.*⁵ (Emphasis
12 added).

13 At the time the MSJ was brought, discovery in the instant matter was not yet complete. The
14 parties were still engaged in discovery in February 2009, which was after the date of the motion. In
15 accordance with *Orme*, summary judgment would not have been appropriate. Even assuming that
16 discovery was complete, testimony and evidence developed during the rate proceeding have
17 probative value in assisting in the adjudication of the claims of SFG.

18 Johnson relies on *Chantal v. Mohave Electric Cooperative*⁶ in support of summary judgment
19 in a complaint proceeding. The reliance is misplaced. In *Chantal*, the Commission granted summary
20 judgment on the issues of whether Mohave had complied with its Commission approved rules,
21 regulations and procedures in dealing with the Complainant and whether the complainant was
22 precluded under the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue
23 preclusion) from bringing the complaint which was the subject of a prior docket and resultant
24 commission decision. The issues to be decided in *Chantal* were narrow, unlike the instant complaint,
25 where there has been no prior proceeding that has adjudicated the claims of SFG.

26 Summary judgment shall be rendered forthwith if the pleadings, deposition, answers to
27 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
28 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of
law.⁷ Contrary to the assertions of Johnson in its motion of summary judgment, there was evidence

⁴ *Orme School v. Reeves*, 166 Ariz. 301, 305; 802 P.2d 1000; 1004 (1990).

⁵ *Id.* at 309. (footnotes omitted).

⁶ *Chantal v. Mohave Electric*, Docket No. E-01750A-04-0929, Decision No. 68592.

⁷ Ariz.R.Civ.P. 56(c)(1).

1 developed during the rate proceeding as well as evidence developed during discovery, that raise
2 issues of fact, which defeats the MSJ. There is no dispute that it is within the discretion of the
3 Commission to grant a motion for summary judgment; however a recommendation by the ALJ in the
4 instant proceeding that the MSJ be granted is not appropriate in the instant proceeding.

5 **III. THE AUTHORITY OF THE COMMISSION.**

6 Johnson argues that the Commission does not have the jurisdiction to hear, SFG's claims
7 regarding the Utility Services Agreement and the Management Services Agreement, because those
8 claims involve contract interpretation. Staff would assert that Johnson's premise is incorrect.

9 Pursuant to A.R.S. Const. Art. 15 § 3, the Arizona Constitution, the Commission "has full and
10 exclusive power in the field of prescribing rates which cannot be interfered with by the courts, the
11 legislature or the executive branch of state government."⁸ As part of its executive and legislative
12 function, the Commission has the exclusive, plenary authority to determine what is just and
13 reasonable in terms of services offered by a public service corporation and the rates charged for such
14 services.⁹ With respect to matters solely and directly involving questions of the reasonableness of
15 services, rates, and the classification of services, the Commission's authority is exclusive and
16 plenary.¹⁰

17 As the Court noted in *Woods*, the Commission's ratemaking authority is not limited to setting
18 rates and charges, but instead extends to every necessary step in ratemaking.¹¹ That authority
19 includes all power which may be necessary or essential to the performance of the Commission's
20 duties.¹² Not only does the Commission have judicial powers that are "inherent in its responsibility
21 to make those decisions necessary to regulate public service corporations, pursuant to Article 15,
22 Section 3, of the Arizona Constitution," the legislature has expanded that authority by expressly
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25 ⁸ *Morris v. Arizona Corp. Comm'n*, 24 Ariz.App. 454, 457, 539 P.2d 928, 931 (1975); see also *Southwest Gas Corp. v.*
26 *Arizona Corp. Comm'n*, 169 Ariz. 279, 283, 818 P.2d 714, 718 (App.1991) (with respect to ratemaking decisions that
27 affect public services corporations, "the Commission is given full and exclusive powers to the preclusion of interference
by the other branches of government"); *Arizona Pub. Serv. Co. v. City of Phoenix*, 149 Ariz. 61, 64, 716 P.2d 430, 433
(App.1986) ("[C]ommission has exclusive ratemaking authority, not to be invaded by any branch of government.").

⁹ *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 645 P.2d 231 (1982).

¹⁰ *Id.* at 242.

¹¹ *State ex rel. Woods v. Arizona Corp. Comm'n*, 171 Ariz. 286, 294, 830 P.2d 807, 815 (1992).

¹² *Garvey v. Trew*, 64 Ariz. 342, 346-47, 170 P.2d 845, 848 (1946).

1 authorizing it to address consumer complaints.¹³ The Commission has the jurisdiction over the
2 consumer complaints of SFG as well as the allegations concerning the Utility Services Agreement.

3 **IV. DISCUSSION OF ALLEGATIONS.**

4 **A. Billing Disputes.**

5 SFG receives both effluent and Central Arizona Project (CAP) water from Johnson. SFG
6 witness David Ashton, in his direct testimony alleges that the bills received by SFG are inaccurate.
7 He also alleges that instead of the \$0.83/1000 gallon rate for CAP water, SFG was charged
8 \$3.75/1000 gallons.¹⁴

9 Johnson's rate for effluent is \$0.62 per thousand gallons as set forth in the wastewater service
10 tariff, and the rate for CAP water is \$0.83 per thousand gallons.

11 During the rate proceeding, Johnson stipulated that there was a billing dispute between the
12 parties.¹⁵ Further the Company admitted that at some point, SFG was charged the incorrect amount
13 for effluent.¹⁶ Mr. Tompsett further admitted that mistakes had been made in the bills rendered to
14 SFG.¹⁷ Johnson witness Brian Tompsett also testified that Johnson had billing problems which
15 caused it to bill at the incorrect rates.¹⁸ So despite Johnson's assertion that it has charged SFG the
16 appropriate rate under its tariff,¹⁹ the evidence in the rate proceeding was to the contrary. What
17 remains at issue is whether the appropriate corrections were made to the SFG accounts.

18 The following discussion from Administrative Law Judge Wolfe during the rate proceeding is
19 instructive:

20 Mr. Crockett, I agree with you that we shouldn't get into the minutia; however, I can
21 see the procedural predicament that Swing First is in. If they don't bring up these
22 issues, then in the other docket it could be alleged or it could be charged that they
23 didn't bring them up here. And vice versa, it could have happened the other way if the
24 complaint docket had gone forward before this docket.

25 ¹³ A.R.S. § 40-246(A) grants the Commission the authority to adjudicate consumer complaints alleging violations "of any
26 provision of law".

¹⁴ Direct Testimony of David Ashton at 13.

¹⁵ Tr. at 252:9-13. All references are to the transcripts for Docket No. WS-02897A-08-0180.

¹⁶ Tr. at 779-780.

¹⁷ Tr. at 779:9-16; Tr. at 781:1-20; Tr. at 946:16-19.

¹⁸ Tr. at 841-842.

¹⁹ MSJ at 21.

1 As it is, there may be facts, whether they are relevant or not or material, it doesn't -- I
2 don't have to decide that at this time. But I do not want to preclude any party of this
case from presenting evidence that they may need in order to prove their case.

3 And I might also add that the parties have had ample opportunity to try to settle these
4 issues before this rate case proceeding, and that is what I would rather have seen.
5 Because I'm sure there is some way, whenever there is a dispute between a customer
6 and a company, there should be way for the parties to come to an amicable solution.
7 That is my belief. And the fact that it hasn't happened, it's not -- there is nothing I can
do about that except to allow the parties to put evidence on. And the company is
certainly free to put evidence on that contravenes the evidence that Swing First is
putting on.

8 I don't know what else to say except that I think due process requires that we allow a
9 customer to present evidence that they have in a rate case proceeding when it comes to
the customer service issue. So I don't want to get into the minutia either because there
10 is another opportunity possibly in a complaint proceeding to do so.²⁰

11 The billing disputes raised during the rate proceeding generated issues of fact and thus preclude the
12 granting of summary judgment.

13 **B. Delivery Of CAP Water When Effluent Was Available.**

14 Johnson and SFG are parties to a 1999 agreement which governs the rights and obligations
15 concerning irrigation water sales and deliveries. The agreement provided for the delivery of effluent
16 and in the event effluent was unavailable, CAP water would be delivered. Setting aside the issue of
17 whether the contract called for the delivery of CAP water charged at the effluent rate (which will be
18 discussed below), SFG has alleged that even when effluent was available, Johnson delivered CAP
19 water. At the conclusion of the evidentiary hearing in Docket No. WS-02987A-08-0180, SFG filed a
20 motion to admit a late filed exhibit which purports to show that Johnson had available effluent.
21 SFG's motion was denied by procedural order dated November 3, 2009. ALJ Wolfe stated, "SFG
22 may wish to pursue the subject matter of its proposed late-filed exhibits in that [the complaint]
23 docket." A grant of JUC's motion would preclude the consideration and examination of this issue.

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²⁰ Tr. at 254-255.

1 **C. The Water Quality Assurance Revolving Fund (“WQARF”) Tax (“Superfund**
2 **Tax”)**

3 The WQARF tax referred to by SFG as the “superfund tax” is a municipal water delivery
4 system tax and it applies to businesses selling water.²¹ The tax is used to fund the water quality
5 assurance revolving fund (WQARF). The tax is levied at the rate of 0.65% of one cent for each 1,000
6 gallons of water delivered.²² The tax is reported at the same time as paying the transaction privilege
7 tax.²³ Staff had no objection to the collection and pass through of this tax in the rate proceeding.
8 There is no mention of this tax in the Recommended Opinion and Order (Docket No. SW-02987A-
9 08-0180). Staff would note that Arizona Administrative Code R14-2-209 (D) (5) allows a utility to
10 collect from its customers a proportionate share of any privilege, sales or use tax.

11 **D. Customer Service Issues.**

12 As ALJ Wolfe noted, customer service issues may be raised during a rate proceeding. During
13 the rate proceeding, Johnson witness Tompsett admitted that Johnson did not follow Commission
14 rules regarding a disconnect notice given to SFG.²⁴ Testimony during the rate proceeding established
15 that for some period of time, the meters of SFG were not read.²⁵ Customer service issues are a proper
16 subject for a complaint proceeding. Because the specific customer service issues raised by SFG and a
17 resolution of those issues were not addressed in the Recommended Opinion and Order, granting a
18 motion for summary judgment, would not allow for resolution of SFG customer service complaints.

19 **E. Utilities Services Agreement And Management Contract.**

20 There are two contacts that are the subject of the allegations of SFG. First, the Utilities
21 Services Agreement, which governs the terms of delivery of irrigation water. This agreement was
22 between Johnson and SFG’s predecessor, Johnson Ranch Holdings. Although the agreement was
23 never formally assigned, SFG and Johnson believed that it governed their relationship.²⁶ SFG
24 contends that the terms of the agreement require Johnson to deliver CAP water at the effluent rate.

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26 ²¹ A.R.S. § 42-5301 *et seq.*

27 ²² A.R.S. § 42-5302.

28 ²³ *Id.*

²⁴ Tr. at 835:25-836:19.

²⁵ Tr. at 389:12.

²⁶ Tr. at 465-466, Direct Testimony of David Ashton at 4.

1 The second agreement is a Management Services Agreement. Under this agreement, SFG
2 agreed to manage the Golf Club at Oasis. SFG alleges that by the terms of the agreement, SFG
3 would receive a water credit instead of payment.

4 Johnson asserts that the ability to interpret the terms of the Utilities Services Agreement or the
5 Management Services Agreement is beyond the scope of the Commission's jurisdiction, citing *Trico*
6 *v. Ralston*²⁷ in support. Staff disagrees with respect to the Utilities Services Agreement and finds
7 Johnson's reliance on *Trico* misplaced. The Utilities Services Agreement, by its terms, contemplates
8 the rates that SFG would pay for effluent and CAP water and the type of services which SFG would
9 receive. Rates and services fall within the exclusive jurisdiction of the Commission.

10 In *Trico*, customers of a utility, Eloy Power and Light, were seeking a declaratory judgment
11 regarding an option contract for a proposed sale of assets to Trico. In *Trico*, there was no dispute
12 over the conditions of service or rates to be charged. In the instant case, we have an agreement
13 between the utility and one of its customers regarding rates and terms of service.

14 The Superior Court has acknowledged that the resolution of the dispute surrounding the
15 Utility Services Agreement falls within the jurisdiction of the Commission. In the *Johnson Utilities*
16 *LLC v Swing First Golf LLC*²⁸, Judge Dunevant found that the proceeding before the court was more
17 than just a "failure to pay case" but a case where "Swing First failed to pay the amounts Johnson
18 demanded and did so because it believed those amounts to be in excess of that provided by the rates
19 fixed by the Corporation Commission."²⁹ Judge Dunevant cited in support of his conclusion, *Qwest v.*
20 *Kelly*³⁰ and *Campbell v. Mountain States Telephone and Telegraph*.³¹

21 In *Qwest*, the plaintiffs, residential customers of Qwest, brought a fraudulent
22 misrepresentation class action against the telephone utility, arising from the purchase of monthly
23 "inside wire" maintenance service for the telephone wire leading from outside the rental units to the
24 telephone jacks located on the walls within the units. The court found that with respect to matters
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27 ²⁷ *Trico Electric Coop. v. Ralston et al.*, 67 Ariz. 358, 196 P.2d 470 (1948).

²⁸ Docket No. CV 2008-0000141.

²⁹ *Id.* Minute Entry dated May 27, 2008.

³⁰ *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (2002).

³¹ *Campbell v. Mountain States Tel. and Tel. Co.*, 120 Ariz. 426, 586 P.2d 987 (1978).

1 solely and directly involving questions of the reasonableness of services, rates, and the classification
2 of services, the Commission's authority is exclusive and plenary.³²

3 Under the terms of the Management Agreement, SFG agreed to manage the Golf Club at
4 Oasis.³³ According to SFG witness Ashton, SFG agreed to manage the Oasis in May 2006.³⁴
5 According to Mr. Ashton, as compensation, JUC was to provide SFG a water credit of 150 million
6 gallons per year.³⁵ The arrangement ended October 31, 2006.³⁶ It appears that the gravamen of
7 SFG's complaint regarding the Management Agreement is that SFG did not receive "payment" for its
8 management services. The claim does not involve a rate or a term of service. Nor is the claim in the
9 nature of a consumer complaint. It is a claim for non-payment for services rendered. Such claims do
10 not fall within the Commission's jurisdiction. As the court held in *Qwest*, "[claims] that are unrelated
11 to or attenuated from those matters over which the Commission has express constitutional or
12 statutory authority do not fall within the Commission's exclusive jurisdiction."³⁷

13 **V. REQUEST FOR ATTORNEY'S FEES.**

14 SFG has requested that attorney's fees be awarded in the complaint proceeding and also the
15 attorney's fees it incurred in its participation in the rate proceeding.³⁸ SFG cites no authority for its
16 request. As the complainant, SFG bears the burden to support its request for attorney's fees. Staff
17 could find no authority that authorizes the Commission to award attorney's fees in a complaint
18 proceeding. As for the request for the attorney's fees for its participation in the rate proceeding, SFG
19 also cites no authority, only that it provided information that would not have been otherwise
20 considered by the Commission. This assertion hardly forms the basis for the award of attorney's fees.

21 **VI. CONCLUSION AND RECOMMENDATION.**

22 Staff concludes that there exist issues of material fact which would defeat Johnson's motion
23 for summary judgment. Because of the testimony given in the rate case, Staff would recommend that
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³² 204 Ariz. at 30, 59 P.3d at 794.

26 ³³ The Golf Club at Oasis, an LLC, has as its manager George Johnson; Ex. S-8 Docket No. WS-02887A-08-0180.

27 ³⁴ Direct Testimony of David Ashton at 5.

³⁵ *Id.*


³⁶ *Id.* at 6.

28 ³⁷ 204 Ariz. 25, 59 P.3d at 794.

³⁸ Direct Testimony of David Ashton at 29-31.

1 the Complaint proceeding be stayed pending a final order of the Commission in the rate proceeding.³⁹
2 Because of the overlap in the issues between the complaint proceeding and the rate proceeding, it
3 would be beneficial to wait until the final order of the Commission in the rate proceeding. The
4 Recommended Opinion and Order is set to be considered by the Commission in the May 26 and 27,
5 2010 Open Meeting. The Commission's order may resolve some issues that are in dispute in the
6 instant docket. If there is a resolution of some issues, the instant docket will be simpler. At that point,
7 Staff would recommend a procedural conference to set a schedule to address any remaining issues.

8 RESPECTFULLY SUBMITTED this 14th day of May, 2010.
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11 
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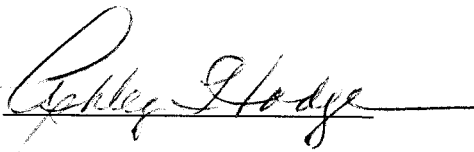
15 Original and thirteen (13) copies
16 of the foregoing filed this
17 14th day of May, 2010, with:

17 Docket Control
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19 1200 West Washington Street
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20 Copy of the foregoing mailed and/or
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28 ³⁹ SFG in its response to the MSJ also requests that the action be stayed pending final order of the Commission in the rate docket. SFG at 12:21-23.